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# Supreme Court of the United States

**OCTOBER TERM, 1944.**

**No. 645**

In the Matter

of

MECCA TEMPLE OF THE ANCIENT ARABIC ORDER OF THE NOBLES OF THE MYSTIC SHRINE,

*Debtor*

WILLIAM DARROCK,

*Creditor-Intervenor-Respondent,*

MECCA TEMPLE OF THE ANCIENT ARABIC ORDER OF THE NOBLES OF THE MYSTIC SHRINE,

*Debtor-Petitioner.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.**

DAVID HAAR,

*Attorney for the Debtor-Petitioner.*

THE COURT PRESS, N. Y. C.

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**Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

*To the Honorable the Chief Justice and to the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Mecca Temple of the Ancient Arabic Order of the Nobles of the Mystic Shrine (hereinafter referred to as "Mecca Temple") respectfully submits this petition for a writ of certiorari, for the purpose of reviewing a decision of the United States Circuit Court of Appeals for the Second Circuit in the above entitled proceeding.

By its decision, the Circuit Court of Appeals reversed an order of the District Court for the Southern District of New York, which in turn had reversed the

order of the Referee in bankruptcy to whom the proceedings had been referred. The decision of the Circuit Court reinstated the order of the Referee, who had dismissed the proceedings of your petitioner, as a debtor, seeking an arrangement with its unsecured creditors under Chapter XI of the Bankruptcy Act. Dismissal by the Referee was predicated on his interpretation of this Court's decision in the case of *Securities & Exchange Commission* v. *United States Realty and Improvement Company*, 310 U. S. 434. Your petitioner's case turns upon the interpretation to be placed upon this Court's opinion, as expressed in the *United States Realty Company* case, *supra*, as to the circumstances under which a debtor, corporate in form only, should be required to proceed under Chapter X, rather than under Chapter XI of the Bankruptcy Act.

The Referee thought that your petitioner should not have proceeded for relief under Chapter XI, but should have proceeded under Chapter X of the Bankruptcy Act. The District Court thought otherwise, holding that your petitioner, as a fraternal organization, and under the facts disclosed, was within its rights in seeking relief under Chapter XI. The Circuit Court of Appeals, however, differed with the District Court, and agreed with the Referee, and thus affirmed the Referee's order of dismissal.

In doing so, however, the Circuit Court of Appeals admitted that on the merits, the answer to the problem posed by your petitioner's peculiar situation, is not clear-cut. The opinion speaks of "borderline cases" in which "there still is no well-defined answer to the question as to whether a particular type of corporation should be permitted to proceed under Chapter XI" (Record, p. 76).

## Jurisdiction.

The order of affirmance was entered in the Circuit Court of Appeals on July 31, 1944 (Clerk's certified order). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347a).

## The Issues of Law Involved.

This case presents squarely a legal problem that all of the District Courts will now be confronted with in the interpretation, and application, of this Court's decision in the case of *Securities & Exchange Commission* v. *United States Realty and Improvement Company*, 310 U. S. 434 (hereinafter referred to as the "*Realty Company*" case). The Referee in bankruptcy, the District Court which reversed his order, and the Circuit Court which reversed the District Court and affirmed the Referee, all base their decisions on the views respectively held by each of them as to what this Court intended by its decision in the *Realty Company* case.

1. Did this Court intend, by that decision, to hold that corporations, organized for fraternity or philanthropy without any profit motive, and having no capital, and no secured debts, shall be barred from seeking the benefits of an arrangement with its unsecured creditors under Chapter XI?

2. Particularly, did this Court intend, by the *Realty Company* decision, to bar a membership organization, corporate in form though it may be,

having no capital and no secured debts, from seeking such relief where the investing public has no interest in the organization, and where the debt was originally created as a result of loans by the membership only —and not one dollar was loaned by the investing public?

3. If this is a "borderline" case, as the opinion of the Circuit Court seems to indicate, was it proper for the Referee to whom the matter was referred for further proceedings under Chapter XI, to issue an order to show cause *sua sponte*, without any petition filed by anybody in interest, and then sit in judgment on his own order to show cause, and thus occupy the position of prosecutor and judge at the same time, when a decision of the Seventh Circuit Court of Appeals, on a similar point of practice, holds to the contrary, as will be pointed out in the brief submitted herewith?

These are the principal points of law which have arisen in this case, as a result of the divergent decisions, flowing directly from this Court's opinion in the *Realty Company* case.

## Statement of Facts.

On July 20th, 1943, your petitioner filed a petition with the Clerk of the United States District Court for the Southern District of New York, seeking relief under Chapter XI of the Bankruptcy Act.

Your petitioner is a fraternal membership corporation organized and existing under the Laws of the State of New York (fol. 161). It is insolvent (fol. 172). It proposed an arrangement with its unsecured creditors, to-wit, to pay them 10% of the

principal amount of the bonds held by each of them. This payment was to be made during a period of ten years, at the rate of 1% per annum (fol. 163).

The schedules annexed to the petition show that it has about 1834 unsecured creditors, but no secured creditors (fol. 176). It owes over $1,200,000 of principal and interest. This money is due to these unsecured creditors because of loans made by them to Mecca Temple on March 1, 1922. The debt has been due since 1933, no interest having been paid for about ten years (fol. 178). There are no executory contracts and no liabilities on notes or bills discounted, or for accommodation paper, and, most important of all, there are no secured debts.

The assets of Mecca Temple consist of a one-quarter interest in a loft building, and a one-sixth interest in a taxpayer, both in New York City. The value is unknown, but the income for 1942 on both parcels is indicated at $1363 (fol. 182).

In addition, Mecca Temple owns cemetery plots in the Kensico Cemetery. It is impossible to state their value. One parcel had been bought in 1899, and another in 1921. Some of these plots had been used for deceased members, and it is uncertain whether the balance can be sold on liquidation (fol. 182).

There are no accounts receivable because the debtor is not in business, but Mecca Temple has membership dues that are owing from members (fol. 184). It is impossible to calculate what this amounts to because so many have been in default for a long time (fol. 185). It has money in the bank amounting to $9,597.74 (fol. 186) and has no other assets (fols. 187-189).

In its statement of affairs accompanying its schedules, your petitioner shows that it is a fraternal organization, but has no business, trade, or profession (fol. 200). It has collected from membership dues approximately $50,000 during each of the two years preceding the date of the filing of the petition, and has some miscellaneous items of receipts amounting to some $2500. It has no other source of income (fol. 201). It has some small property in trust, to-wit, hospital fund for the Shriners, which maintains a hospital for crippled children (fol. 205).

In affidavits filed under the District Court Rules, Mr. Donnatin, the recorder-secretary of Mecca Temple, states that the debtor has approximately 2800 members, who pay dues annually. The affairs of your petitioner are managed by Mr. Donnatin and a staff of employees (fols. 152, 153). Creditors of the debtor are largely bond-holders who had subscribed to bonds in 1922 for the purpose of providing funds for the construction of a building known as "Mecca Temple" (fol. 154).

The following statement is also contained in the affidavit:

> "The debtor has been in existence for over seventy-six years. A cessation of its activities would bring a hardship on all of its membership, in that, the benefits and purposes of fraternity and philanthropy among them in the organization will be completely lost" (fol. 158).

Upon the filing of the petition with the District Court, Judge Bright made an order referring the matter to Hon. Oscar W. Ehrhorn, one of the Referees in bankruptcy "to take such further pro-

ceedings therein as are required and permitted by said Act" (fol. 149). Referee Ehrhorn disqualified himself because he is a member of Mecca Temple (fol. 150). Thereupon Judge Bright made a further order dated July 23, 1943, referring the matter to Hon. Robert P. Stephenson as the Referee in bankruptcy (fol. 150).

THE PROCEEDINGS BEFORE REFEREE STEPHENSON.

Almost immediately, Referee Stephenson, instead of calling a meeting under Section 334 of the Bankruptcy Act, sent out notices to the debtor's attorney, Mr. Haar, and to the Securities and Exchange Commission, reading as follows:

> "At New York, in said District, on the 23d day of July, 1943.
>
> Upon the debtor's petition, schedules and statement of affairs, it is hereby
>
> ORDERED that the debtor and the Securities and Exchange Commission show cause before me on July 29, 1943, at 10:30 o'clock in the forenoon, at Room 201, United States Court House, Foley Square, New York City, why this proceeding under Chapter XI of the Bankruptcy Act should not be dismissed on the ground that this proceeding ought not to be allowed to proceed" (fols. 32, 33).

It will be observed that this order to show cause was not accompanied by any petition or affidavit made by anybody in interest showing the facts which might justify an order that "this proceeding ought not to be allowed to proceed".

Upon the return day of this order to show cause, Mr. Haar, the debtor's attorney, protested against

the proceeding (fol. 42). Mr. George Zolotar, the attorney for the Securities and Exchange Commission, made a statement concerning the Commission's position. He said that he was appearing without the Commission's authorization. During the past few days they had been trying to determine whether or not "there is any public vested interest in this particular debenture". They found that a small amount of over-the-counter houses had, from time to time, bought or sold these bonds or debentures. This was largely due, he thought, to the fact that "*the debentures are largely held by the members*" (fol. 49). In fact the over-the-counter houses informed them that in most instances the transactions involved *members* who wanted to dispose of the bonds, or wanted to purchase an individual bond (fol. 46).

Mr. Zolotar further stated that the public interest was "insignificant" and suggested that if Mr. Haar produced sworn testimony as to the amount which is in the hands of the members, and considering the fact that it is a fraternal benefit society, "and not an ordinary corporation organized for profit" he thought the Referee should be satisfied that the *United States Realty Company* case does not apply (fol. 47).

At an adjourned hearing on August 2d, 1943, Mr. Haar again protested that the Referee had no authority to initiate a proceeding of this kind without the Securities and Exchange Commission requesting him to do so (fol. 57). The Referee stated that he would proceed and hear the evidence. Since there was no movant other than the Referee, who might be considered such by reason of the issuance of his order to show cause of July 23, 1943, no one came forward to offer proof in support of the order to show cause.

However, the debtor's attorney offered proof of the origin and function of your petitioner. The debtor was organized in 1872 (fol. 66) as a fraternal organization, which received its charter as such from the Imperial Grand Council of the Ancient Arabic Order of the Nobles of the Mystic Shrine (fol. 66). At that time, it was an unincorporated association. In order to make it corporate in form, it complied with the Laws of the State of New York enacted in 1896. Under that statute, the Imperial Council was permitted to issue charters to such organizations as your petitioner. If already issued, then, upon the filing of a certificate of the election of trustees with the Secretary of State, it assumed its aspect of a fraternal "corporation" as distinguished from a fraternal organization, unincorporated in form. The certificate was filed on June 21, 1905 (fol. 68).

The proof shows that your petitioner's membership consists of men only. They do charity among the members (fol. 74). It has some lots in a cemetery and which are used exclusively for the benefit of the members of Mecca Temple who want to use it (fol. 75).

It is not engaged in business for profit, and neither buys, nor sells, anything. The only source of income are dues from the membership (fol. 75).

On the question of the public interest in these bonds, the record shows the following:

> "Q. Do you know whether any of the money that was borrowed back in 1922 and 1923 by Mecca Temple and for which these bonds were issued, was solicited generally from the public? A. No, sir, it was not.
>
> Q. From whom did you get the money? A. From the membership of Mecca Temple" (fol. 77).

In addition to money borrowed from the membership money was also borrowed from various Masonic lodges, who had been requested by members of Mecca Temple, and who were also members of these lodges, to subscribe (fol. 78).

They had to be Masons in order to subscribe (fol. 79). Where a woman's name appears on a list of creditors, it does so because, if a member died, his wife would have the bond and the widow would inform the Temple that she had it (fol. 80). If a woman's name is on the list from the beginning, it would be there because the member, when he subscribed, asked that the name of his wife, or daughter, be entered in the book. But the subscription came through the member (fol. 81).

All the members of Mecca Temple who subscribed to these bonds are also Masons.

> "Q. In so far as you know, no member of the general public ever subscribed for any of these bonds in 1922 or at any other time? A. No.
>
> Q. They certainly were not asked to, to your knowledge. A. No" (fol. 81).

The witness who testified to these facts was Ruth E. O'Brien who had been connected with Mecca Temple for about twenty-five years.

Mecca Temple has been in existence since September 26th, 1872, and its functions are performed under a charter granted at that time by the Imperial Council (fol. 84).

The members do not all live in New York City or its vicinity, but they are scattered all over. In fact some members live in California (fols. 97, 98).

These are the only facts about which any testimony was given before the Referee pursuant to his order to show cause dated July 23d, 1943.

## The Reasons Relied On for the Allowance of the Writ.

1. The Court below has decided a federal question, to-wit, a question arising under the Bankruptcy Act, in a way that seems to conflict with the intent of this Court's decision in the *United States Realty Company* case, and its subsequent decisions bearing specifically on the point in issue.

2. The Court below has decided an important question of federal law, which has not been, but should be settled by this Court, to-wit, whether a fraternal organization, having no capital, not organized for profit, having only unsecured creditors, must apply for reorganization under Chapter X, and is barred from seeking the benefits of an arrangement under Chapter XI of the Bankruptcy Act.

3. The ruling of the Circuit Court of Appeals is novel in its application to fraternal organizations who seek the benefits of Chapter XI, because they have no secured creditors and the general public is not concerned with its affairs.

4. The Court below decided that the Referee in bankruptcy had the power *sua sponte* to issue the order to show cause and make the order of dismissal. This appears to be in conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit,

which, on a similar question of practice, ruled otherwise.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to the United States Circuit Court of Appeals should be granted.

MECCA TEMPLE OF THE ANCIENT
ARABIC ORDER OF THE NOBLES OF
THE MYSTIC SHRINE,
By LOUIS B. DONNATIN,
Recorder,
*Petitioner.*

## BRIEF IN SUPPORT OF PETITION.

### POINT I.

**The decision sought to be reviewed appears to conflict with the spirit and intent of this Court's decision in the *United States Realty Company* case, and its subsequent decisions on the point in issue.**

*Securities and Exchange Commission* v. *United States Realty Company*, 310 U. S. 434;
*Marine Harbor Properties* v. *Manufacturers Trust Company*, 317 U. S. 78.

The three decisions in this case turn upon an interpretation of this Court's opinion in the *United States Realty Company* case, *supra*. The Circuit Court agreed with the Referee that under that decision, the petitioner was barred from seeking relief under Chapter XI of the Bankruptcy Act. The District Court, on the contrary, held that the *United States Realty Company* case was not a bar, and did not require that a fraternal organization, or, for that matter, any corporation similarly situated, to proceed under Chapter X rather than Chapter XI of the Bankruptcy Act.

That there is some doubt on the subject, appears admitted in the opinion of Judge Clark, for he says:

> "On the merits the answer is not as clear cut; but we are of the opinion that the Referee acted

> properly in dismissing the petition in favor of a proceeding under Chapter X * * *. Of course there still is no well-defined answer in the borderline cases to the question as to whether a particular corporation should be permitted to proceed under Chapter XI * * *" (Record, p. 76).

In the *United States Realty Company* case we find that this Court refers, over and over again, to the "public" interest. In that case it was the Securities and Exchange Commission that originally intervened, in order, as this Court said in its opinion "to protect the interests of the public, especially committed to its guardianship under the provisions of Chapter X".

In our case, Securities and Exchange Commission refused to appear, and, insofar as it did appear, stated unequivocally that the "public" was not interested, and evidently did not care to intervene.

That the backbone of the *United States Realty Company* case is that that debtor's affairs were the concern of the public at large, is clear from the many frequent references in the opinion to the "public". Thus "Chapter X * * * is specifically adapted to the reorganization of large corporations whose *securities are held by the public*".

At another part of the opinion, this Court said that the question as to whether or not the procedure to be followed by a debtor should be under Chapter X or under Chapter XI, must be based on "considerations growing out of the *public policy* of the Act".

In a footnote to the opinion, this Court said:

> "The basic assumption of Chapter X and other acts administered by the Commission, is that the investing public dissociated from control or active participation of the management, needs impartial and expert administrative assistance * * *" etc.

The District Court, in its opinion, pointed out a very important word of warning that this Court gave in a consideration of cases of this kind. This Court said (at p. 454):

> "While this means that arrangements of unsecured debts of corporations, like respondent, may not be in the best interests of creditors and feasible under Chapter XI, it does not mean that there is no scope for application of that Chapter in many cases where the *debtor's financial business and corporate structure differs from respondent's*" (Record, fol. 143). (Italics ours.)

In the *United States Realty Company* case this Court had before it a corporation whose financial structure was not only multiple, but extremely complicated. It had secured debts of various kinds. It had unsecured debts. It had stockholders who had invested money in the company and who might benefit in a monetary way by any arrangement effected under the Bankruptcy Act.

Not so here. As the District Court points out:

> "We have here not a business corporation with an involved financial set-up; with different types of creditors. We do have a membership corporation with very little property; with no

> intricate financial set up; *with only one type of creditor* (unsecured bondholders); and with no business or occupation. We are dealing with a fraternal organization for men who hold meetings for their own benefit, socially and fraternally; an organization which has outstanding, unsecured bonds which it cannot pay" (fol. 144).

But, says the Circuit Court in its opinion, the annual income of the debtor is in excess of $50,000, with disbursements of $15,000, and it points out that there is no explanation of the use to which the balance of the receipts is being put.

It seems to us to be unnecessary to require this debtor to go under Chapter X merely for the purpose of obtaining an explanation. Such an explanation, if anyone needed it, can be obtained fully in the proceedings under Chapter XI, on the examination of the debtor's officers, or its books and records. Section 21a of the Bankruptcy Act is quite ample as an instrument of inquiry on any subject pertaining to the acts and property of a bankrupt.

If that were all, then clearly the decision of this Court in the *United States Realty Company* case was misapplied, for we feel certain that it was not intended by this to compel a shifting from Chapter XI to Chapter X, merely because an investigation might be necessary to ascertain the facts regarding the disposition of a debtor's moneys and other property.

This Court's observation in the *United States Realty Company* case that Chapter X is applicable only to corporations of complicated financial structure, is borne out by its subsequent decision in the case of *Marine Harbor Properties* v. *Manufacturers*

*Trust Company*, 317 U. S. 78. This Court said there:

> "There remains the contention that it was in the 'interests' of the certificate holders to have the proceedings transferred to Chapter X. In this connection much emphasis is placed on numerous safeguards contained in Chapter X, which this Court reviewed in *Securities and Exchange Commission* v. *United States Realty and Improvement Company*, 310 U. S. 434, 438, 450. And it is asserted that comparable safeguards are wholly or largely lacking in proceedings under the Schackno Act. Those considerations would be highly relevant and persuasive if this was a case of the usual reorganization proceeding *dealing with more than one class of securities under the older procedure* which Chapter X was designed to improve and supplant. (See *Securities and Exchange Commission* v. *United States Realty and Improvement Company*, 310 U. S. 448.)" (Italics ours.)

The Circuit Court suggests, in its opinion, that it is probable that many of the members and creditors do not know of the pendency of these proceedings, and that many who have been informed, suffer from a grave lack of accurate information as to the true state of affairs. Then it proceeds to state that for this information the petition under Chapter X is again the only fair solution.

We must respectfully differ with the Court in its conclusion, because its premises are not sound. If it be true that many of the creditors do not know of the pendency of these proceedings, it is because the Referee did not perform his duty to send out notices to all of the creditors giving them the information.

Instead of that, on the very day of the order of reference (July 23, 1943) he entered an order to show cause directed against the petitioner's attorney and the Securities and Exchange Commission, requiring both to show cause why the petition should not be dismissed. Why weren't the creditors notified? It seems to us that they had something to say about it too. At least they should have been informed of the proceedings, and then the criticism suggested by the Circuit Court in its opinion would have been avoided. The mere fact that the creditors did not know, because they were not informed, of the pendency of the proceedings does not, in our opinion, require a petition under Chapter X "as the only fair solution".

In any event, there is nothing in the *United States Realty Company* case even touching on such a reason for a transfer of a case from Chapter XI to Chapter X.

The real purpose of Chapter X, which is an elaboration of the former Section 77b of the Bankruptcy Act, is well set out by Mr. Gerdes in his article on "Corporate Reorganization", 52 Harv. Law Review, p. 1, at p. 5:

> "The petition must now contain a statement as to why adequate relief cannot be obtained under Ch. XI of the Bankruptcy Act, dealing with 'Arrangements', a new procedure substituted for the old composition in bankruptcy *and applying to persons having no secured creditors.* This is intended to make Chapter X unavailable to corporations having simple debt and capital structures whose only purpose in resorting to the reorganization procedure, is to gain by delay temporary advantages for the old management."

(Citing H. R. 12889, 74th Congress, 2 Sess., H. R. 1409, 75th Cong., 1st Sess. (1937), 41.)

It is respectfully submitted that the undisputed facts in this case show that the petitioner has a simple debt involvement. It has no capital structure such as commercial corporations have. Chapter X is unavailable to it by reason of that fact, even though the debt exceeds one million dollars.

In this connection, and bearing on the question of the applicability of this Court's decision in the *United States Realty Company* case, it is pertinent to inquire as to whether the members are real stockholders in the same sense as are the stockholders in the United States Realty Company. The 2800 members of Mecca Temple are stockholders in name only—that name being artificially created for them by the Act. It must be apparent to this Court that the framers of the Act sought to differentiate between individuals and corporations as such, and that in order to give the benefits of the Act to such debtors who were neither individuals, nor corporations in a real sense, they classified as "stockholders" all other members of debtors who are not individuals, but who have a resemblance to corporations. This includes members of unincorporated associations, joint stock corporations, and similar organizations, and, of course, includes fraternal organizations.

But we must look to the realities of each case. Are the members of a fraternal organization *really* "stockholders"? Take this very case of the petitioner before the Court. The evidence is uncontradicted that Mecca Temple began as a membership organization, receiving its charter in 1872 from the Imperial Council. It assumed corporate existence in 1905,

thirty-three years later, under the provisions of law of the State of New York passed in 1896. The only method of assuming corporate existence was by the filing of a certificate indicating the appointment of trustees (Record, fols. 68, 69).

Artificially and legally, Mecca Temple is a corporation (Bankruptcy Act, Sect. 1, subd. 8). Actually, those who are part of it, are *members*, but not stockholders—except insofar as the Bankruptcy Act defines the word "stock" as inclusive of membership in a fraternal organization (Sect. 106, subd. 12).

As members, these men pay dues from year to year. Their right to membership cannot be assigned. It cannot pass by will. It cannot pass under the Decedents' Estate Law of any state. A member may resign, and he loses all rights of fraternal membership. He may default in the payment of dues, with similar result, and, possibly, in rare instances, a member may be dismissed under the by-laws for conduct which may be inimical to the organization.

Can you say the same of a stockholder in a business corporation? Obviously not. A stockholder can sell his stock, and the purchaser takes his place in the corporation. He may bequeath it by will, or, if there is no will, it passes to his heirs-at-law. He cannot, under any circumstances, be deprived of his ownership in the corporation, no matter what his conduct may be.

We point out these considerations, because we feel that in that regard there is a vast distinction existing between a fraternal organization imbued with corporate powers, and a business corporation like the United States Realty Company is, which is a corporation by reason of a subscription to capital stock, and which is the basis of its business life. This Court in

its opinion in the *United States Realty Company* case could not possibly have intended what it said there, of business corporations, to apply to nonbusiness corporations such as Mecca Temple is.

In view of these considerations and the confusion in the concept of corporations which may apply under Chapter XI and which may apply under Chapter X for relief under given circumstances, it is respectfully submitted that this Court never intended that the decision in the *United States Realty Company* case should apply to a case where the debtor has no such capital structure, nor complex financial set-up, and is not organized for profit of its stockholders, and has no secured debts.

It is therefore respectfully submitted that this Court should grant the writ so that it may explain, or limit, or define its decision in the *United States Realty Company* case, with the object in view of avoiding confusion in the various District Courts where possibly, fraternal organizations, hospitals, charitable institutions, or similar bodies corporate in form seek relief under Chapter XI, rather than Chapter X.

## POINT II.

**The Court below has decided an important question of Federal law which has not been, but should be, settled by this Court.**

A reading of the opinion of the Circuit Court would seem to indicate that it has disregarded the fact that Mecca Temple has no secured creditors and that its debts are wholly due to unsecured creditors. Moreover, and in this connection, it has de-

cided that the members of Mecca Temple, like stockholders in a business corporation, should be required to have their interest in the assets of the debtor curtailed to compensate the losses of the bondholders (Record, p. 78). This view is given on the basis of the *United States Realty Company* case, and which in turn relies on the rule in *Northern Pacific Railway Company* v. *Boyd*, 228 U. S. 482, as applied in *Case* v. *Los Angeles Lumber Products Company*, 308 U. S. 106.

The opinion gives this as another reason for reversing the holding below (Record, p. 78).

It is true that the *United States Realty Company* case pointed out that, in that case, the stockholders should be required to curtail their own rights in the assets, and for that reason corporate reorganization under Chapter X, and not an arrangement under Chapter XI was the proper remedy.

But this Court did not have before it a case where the stockholders were such in name only, and where there was no capital at all, and where the only assets in which the 2800 members could share, even if you call them "stockholders", were cemetery lots of no value, a minute share or interest in real estate which gave an income of some $1300 a year, and the usual paraphernalia of a Masonic organization.

Now, what rights could members surrender in a fraternal organization that are equivalent to rights which could be surrendered by stockholders in a business corporation? Could a member of Mecca Temple give up part of his membership to the bondholders? Could he surrender his right to be buried in the cemetery? Could he give up any share of the minute interest in the two parcels of real estate?

In accordance with the realties of the situation,

what would these members of Mecca Temple be confronted with if they were required to proceed under Chapter X? They would be confronted with an impossible situation. Many, if not all, would resign their membership rather than "reorganize" under compulsion. Being a voluntary membership organization, these members could just as voluntarily depart from that membership, either by a written resignation, or by a failure to pay dues. Just how would such procedure benefit bondholders?

On the other hand, where a debtor is a commercial corporation, its stockholders, being vitally interested in safeguarding moneys invested by them as capital in the corporation, could be required to surrender part of that interest in order to save the balance. This is what this Court undoubtedly intended to rule in the *United States Realty Company* case. We cannot believe that this Court intended to have that ruling apply to a fraternal organization such as Mecca Temple is—because it could not apply as a matter of fact.

We therefore respectfully point to this as another reason for granting the writ. We feel that in doing so, and in reviewing the decision of the Court below, this Court will be enabled to extend, or limit, the ruling it made in the *United States Realty Company* case, so as to define more clearly the limitations placed upon debtors who seek relief under Chapter XI as distinguished from those required to seek relief under Chapter X.

## POINT III.

**The ruling of the Circuit Court is novel, since it applies to fraternal organizations which have no capital even though corporate in form. For that reason this Court should grant the writ and consider and decide the question at issue.**

Nowheres in the books do we find any similar ruling on the necessity for applying for relief under Chapter X by fraternal organizations who have no secured indebtedness, and no capital structure.

Without the necessity of repeating the novel facts and the reasons for our position which we have already discussed in the preceding two points, we respectfully ask the Court to consider them in connection with the point we make now. We believe the decision is a novel one, when applied to fraternal organizations.

This is particularly so in view of the ruling in the Circuit Court of Appeals, for the Fourth Circuit, in the case of *Hoile, et al.* v. *United Life Insurance Company,* 136 F. (2) 133 (May, 1943), which holds that an *involuntary* petition for corporate reorganization may not be filed as against a fraternal organization. If that be so, then the question arises whether a fraternal organization can be compelled to file a petition under Chapter X voluntarily. The objective of both petitions would be the same, to-wit, a reshuffling of the secured and unsecured debts. If it cannot be done involuntarily, we believe that this Court ought to consider the question as to whether *voluntary* petitions for reorganization should be compelled by forcing

proceedings under Chapter X on the part of fraternal organizations such as the petitioner is.

For that reason too we respectfully submit this Court should grant a writ of certiorari in this case.

## POINT IV.

**On the question of the right of the Referee *sua sponte* to initiate the proceedings for dismissal, there is conflict between the Circuit Court in the Second Circuit and the Seventh Circuit on this point of practice.**

*In the Matter of Frank E. Walsh*, 256 Fed. 653 (CCA 7).

It will be recalled that, immediately upon the reference by the District Court to Referee Stephenson, he initiated the proceedings for a dismissal by an order to show cause. No party in interest filed any petition upon which that order to show cause was based. Protest against such procedure on behalf of the debtor proved of no avail. The District Court questioned the right of the Referee to proceed in this manner, but did not base its decision of reversal upon it (fols. 142, 143). The Circuit Court considered the matter and said that he had such power (Record, p. 75).

Now, it should be observed that the Referee himself, as well as the District Court, pointed out that this does not involve the question of jurisdiction in the sense of no power at all to pass on the subject. Indeed, the Referee stated in his opinion "This is not a question strictly of jurisdiction * * *" (fol. 137).

Unlike the *Ettinger* case, 76 Fed. (2) 74, cited by the Referee (fol. 114) there is no claim that the debtor imposed upon the Court, or that the pleadings themselves disclosed lack of jurisdiction as in the case of *Metcalf* v. *Watertown,* 128 U. S. 586.

The point made by the debtor's counsel was that the Referee *had a duty of going forward* in accordance with the order of reference, even though it might develop later that a creditor might protest against the proceedings. While no protest was lodged in the *U. S. Realty Company* case by a creditor, nevertheless it was lodged by the Securities and Exchange Commission, as intervenor representing the public.

It is our contention that the Referee could not act *sua sponte* in the manner in which he did. He could not be a movant and a judge at the same time. We have been overruled on that point in this case.

We therefore respectfully call the Court's attention to a somewhat similar situation in which the ruling was otherwise. In the case of *Matter of Frank E. Walsh,* bankrupt, decided by the Circuit Court of Appeals for the 7th Circuit, 256 Fed. 653, the question arose as to whether the Court could, of its own motion, file objections to a discharge. The Court held that it could not in the following language:

> "Nor should the Court on its own motion interpose objections to the discharge, for courts do not create issues. They sit to try and determine them upon presentation of the evidence by the parties interested."

We believe we have an exactly similar situation presented here which requires a final ruling by this

Court. Mecca Temple was within its rights in applying for relief under Chapter XI. If its procedure under Chapter XI was detrimental to the interests of the creditors, it was the privilege of any creditor to say so. Or, if the public was interested sufficiently to justify it, Securities and Exchange Commission could intervene and say so, as it did in the *Realty Company* case.

We do not conceive it to be the duty of a Referee, on his own motion, to require the parties to show cause why a petition, regular on its face, should be dismissed.

The Referee becomes the moving party. He also sits as a judge on his own motion. As a judicial officer on a motion of this kind, he is required to pass on facts as well as law, yet he offers no proof in support of his own motion brought before himself as a judge.

Stated in this way, the situation seems to be a rather difficult one, and contrary to orderly judicial procedure. Such practice has been condemned in the Seventh Circuit. Under the circumstances, this Court is respectfully asked to consider and decide whether the ruling laid down in the Seventh Circuit is correct, or whether the ruling laid down in this case in the Second Circuit, is correct, with regard to this kind of practice.

## CONCLUSION.

**Since the decision below is predicated almost wholly on the *United States Realty Company* case, it is respectfully submitted that the *Mecca Temple* case, differing in its essential facts from the *United States Realty Company* case, justifies the issuance of a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. If not that, then the conflict in point of practice between the Seventh Circuit and the Second Circuit requires the issuance of the writ of certiorari.**

Respectfully submitted,

DAVID HAAR,
*Attorney for Debtor-Petitioner.*

(23)

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CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

**October Term, 1944**

**No. 645**

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IN THE MATTER

OF

MECCA TEMPLE OF THE ANCIENT ARABIC ORDER OF THE NOBLES OF THE MYSTIC SHRINE

*Debtor*

---

WILLIAM DARROCK

*Creditor-Intervenor-Respondent*

MECCA TEMPLE OF THE ANCIENT ARABIC ORDER OF THE NOBLES OF THE MYSTIC SHRINE

*Debtor-Petitioner*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF FOR CREDITOR-INTERVENOR-RESPONDENT IN OPPOSITION

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## BRIEF FOR CREDITOR-INTERVENOR-RESPONDENT IN OPPOSITION

(*Figures in parentheses, except as otherwise indicated, refer to the folios of the Transcript of Record.*)

### Opinions Below

The opinion of the Referee is found at pages 38-44 of the Transcript of Record.

The opinion of the District Judge is found at pages 45-49 of the Transcript of Record.

The unanimous opinion of the Circuit Court of Appeals is reported in 142 Fed. (2d) at pages 869 *et seq.* and is found at pages 73-79 of the Transcript of Record.

## Jurisdiction

The order of the Circuit Court of Appeals reversing the judgment of the District Court and reinstating the order of the Referee, was entered on July 31st, 1944 (R. p. 80).

The jurisdiction of This Court is being invoked under §240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. §347[a]).

## Questions Presented

Two questions are presented,—

(a) Whether the Referee's dismissal of the petition on his own motion was improper, although respondent herein as intervening-creditor also pressed for such dismissal; and

(b) whether the petition was correctly dismissed on the merits.

## Statutes Involved

Bankruptcy Act:

Section 1, subd. 8
Section 21a
Section 77b
Section 106, subd. 12
Section 334
Section X
Section XI

## Statement

The debtor herein filed a petition under §322 of Chapter XI of the Bankruptcy Act. The Referee, to whom this matter ultimately was referred by the District Court, *sua sponte,* issued an order that the debtor and the Securities and Exchange Commission show cause why the petition should not be dismissed. After several hearings at which the Commission appeared informally and respondent, as intervening-creditor pressed for dismissal, the Referee finally dismissed the petition, being of the opinion that fair and equitable relief for the creditors of the debtor could be obtained only by a proceeding under Chapter X of the Bankruptcy Act.

The District Court for the Southern District of New York, in an order made in December, 1943, reversed and vacated the order of the Referee and directed the Referee to proceed with the petition of the debtor in accordance with the provisions of Chapter XI of the Bankruptcy Act (6-9).

The intervening-creditor Darrock, appealed to the Circuit Court of Appeals which, with a unanimous opinion, reversed the order of the District Court.

By its petition for a writ of certiorari, petitioner seeks to review the order entered pursuant to that unanimous opinion of the Circuit Court.

## Argument and Statement of the Facts

On July 20th, 1943, the debtor filed in the United States District Court for the Southern District of New York, a petition and schedules for arrangement pursuant to Sec. 322 of Chapter XI of the Bankruptcy Act (160-210). On the same day, two orders were entered on the debtor's petition, one continuing the debtor in possession of its property, and the other staying the intervening creditor-respondent herein.

The debtor organization has some 2800 members (152) and the bondholders, the only creditors of the organization, number some 1834 (176). It maintains an executive office, has an interest in two pieces of real estate (18), owns two cemetery plots (182), has accounts receivable (dues from members) (184), maintains a number of bank accounts (186), has an annual income in excess of $50,000 (201), disburses $10,000 a year for salaries of secretaries, publishes a magazine quarterly, and owes on unsecured claims (principal and interest) an amount approximating $1,200,000 (194).

By the submitted plan of arrangement, the debtor proposed to pay to all of the bondholders ten percent of the principal amount of the outstanding bonds in installments of 1% per year, without interest (163), approximately $7,630 per year for ten years (229).

On August 9th, 1943, the Referee, to whom the matter had been referred, signed the order of dismissal aforementioned (34-38), and on said date, rendered a full opinion and also made findings of fact and conclusions of law (112-132), in substance to the effect, that adequate, just and equitable relief for the creditors of the debtor cannot be obtained by a proceeding under Chapter XI and that such relief can only be obtained by a proceeding under Chapter X.

This, the District Judge reversed and vacated and he directed the Referee to proceed with the petition of the debtor in accordance with the provisions of said Chapter XI of the Bankruptcy Act (69). The District Judge in his opinion (pp. 45-49) stated that he disagreed with the Referee, questioned his authority to dismiss the petition and held that the debtor was of a different type of corporation from the one involved in *Securities and Exchange Commission* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434 (hereinafter referred to as the *U. S. Realty* case), and therefore was not barred from seeking relief under Chapter XI of the Bankruptcy Act. This reversal was followed

by an appeal to the Circuit Court of Appeals by William Darrock, said creditor-intervenor and the Circuit Court reversed the District Court in a unanimous opinion (pp. 73 to 79) and directed that the order of the Referee be reinstated (235-236).

The Referee had found that it was the duty of the Court, *sua sponte,* when it believed its jurisdiction to have been imposed upon, to inquire into the facts and act in accordance therewith (citing authorities). The Referee in his opinion (pp. 38-43) went into a discussion of the liabilities, the nature of the creditors and so forth.

The Circuit Court held that this was an insolvent membership corporation of some 2800 members; that its annual income from dues was approximately $50,000 and that it had additional small miscellaneous receipts of some $2500 while its disbursements ran to some $10,000; that it owed in principal and interest on debenture bonds, approximately $1,200,000 on which no interest had been paid for upwards of the past ten years; that these bonds were originally sold exclusively (except for the sum of some $20,200 of principal sold to architects) to members of the debtor corporation and to other fraternal organizations to which the members of the debtor also belonged; that "through inheritance, assignment and sale, however, the bonds have so changed hands that present holders are 1834 in number, scattered throughout the country, and not necessarily all members of the debtor"; that the creditor-intervenor herein was not a member of the debtor or of any fraternal organization to which the debtor's members belonged and owned $1200 face value of these bonds; that the creditor-intervenor "pressed for a dismissal", after the Referee had initiated the proceedings which resulted in the dismissal of the petition.

According to its opinion, fair and equitable relief for the creditors of the debtor could be obtained only by a proceeding for reorganization under Chapter X of the Bankruptcy Act and "a Referee in bankruptcy clearly has

the power *sua sponte* to dismiss a petition for an arrangement under Chapter XI and relegate the debtor to reorganization proceedings under Chapter X'' (225-226, pp. 75-76).

The Circuit Court discussed the debtor's proposed plan and its obvious inequity, and referring to the debtor's income of ''well in excess of $50,000, while disbursements total less than $15,000'', noted the absence of ''explanation of the use to which the balance of the receipts is being put. Some explanation is surely due the creditors before they should be obliged to accept ten cents on the dollar for their principal and nothing at all for their long overdue interest.'' The result the Court denominated ''palpably unjust to the unsecured creditors of a corporation whose income appears to exceed its authorized expenditures by nearly $40,000 yearly. These facts by themselves suggest that the plan merits condemnation under Bankruptcy Act, §366(2) which states that the Court shall confirm an arrangement only if it is convinced that 'it is for the best interest of the creditors' '' (229-230).

The total number of bondholders, the wide area over which they are spread, make it, as the Circuit Court said, unlikely that there is any definite accord in this matter. ''Indeed'', said the Circuit Court, ''it is more probable that many (creditors) do not even know of the pendency of these proceedings and that many who have been informed, suffer from a grave lack of adequate information as to the true state of affairs. For this situation, a petition under Chapter X, is again the only fair solution'' (231).

## POINT I

**The unanimous decision of the Circuit Court sought to be reviewed is in accord with This Court's decision in the *United States Realty* case.**

This Court in the *U. S. Realty* case (*supra*) has made an exhaustive comparison and analysis of the respective purposes of and merits of proceedings under Chapters X and XI and as the Circuit Court stated: "there is little which can be added to the criteria set forth" (227). There may be borderline cases, but "especially persuasive here, is the nature of the debtor's financial structure which is such that if a reorganization under Chapter X is not required the interests of an objecting creditor like appellant (respondent here) are not likely to be adequately protected" (228).

Chapter X establishes safeguards in the interest of thoroughness and disinterestedness. A trustee appointed by the Court devises the plan and not the debtor. The trustee, Securities and Exchange Commission and the Court carry on the debtor's affairs. Acceptances of the plan cannot be solicited until after the Court's approval of it. It is particularly applicable to a debtor corporation with widely scattered security holders and debts divided into small units, such as bonds and debentures.

In the case at bar, indisputably there are approximately 2800 members of the debtor's organization. There are some 1834 bondholders from New York to California (176-177), men, women, estates of decedents, corporate and fraternal organizations and partnerships (177), holding securities (a form of debenture bond) of the debtor, in denominations of $100, $500, and $1,000, past due, which, exclusive of interest, exceed some $750,000 par or face value.

In a footnote to the *U. S. Realty* case appears the following:

> "The basic assumption of Chapter X * * * is that the investing public disassociated from control or active participation in the management, needs impartial and expert administrative assistance in the ascertainment of facts, in the detection of fraud and in the understanding of complex financial problems" (citing authorities).

These 1834 creditors to whom over a half million dollars exclusive of interest is owed, are entitled to have a "fair, equitable and feasible" plan of reorganization or arrangement, not something slipped through secretly and unknown to practically all of them.

For the creditors to obtain such "fair, equitable and feasible" adjustment of their claims, the following seem vital:

1. A thorough examination of competent witnesses, such as the officers of the debtor organization. The accountants and auditors who prepared financial reports for the organization would likewise be valuable witnesses. These men should be examined among other things, as to the assets of the debtor, as to where its fortune has disappeared, as to the ways and means of economical and businesslike administration of the debtor. Such a thorough examination of these witnesses must be conducted by a disinterested person, not by the attorney for the debtor, but by the attorney for a Trustee. This is impossible under Chapter XI.

2. The fullest disclosure under oath of all assets of the debtor no matter how held, whether by dummy, subsidiary, affiliates, trustees or otherwise and of its income. This is impossible under Chapter XI.

3. A reorganization of the debtor so that it will be operated on an economical and sound business basis. Useless expenditures and extravagances and possibly private gains must be eliminated. There must be a frank disclosure of the monies received from dues, from initiations, from rents, from the sale of cemetery plots, from bequests and devises, of the disposition of non-income and income-producing real estate, of the amount of dues receivable and collectible. This is impossible under Chapter XI.

A disinterested trustee running this organization in a businesslike manner, should ascertain how many of these seven hundred odd thousand dollars face value of bonds can be turned in gratis and do not any longer fairly constitute an obligation. This could be properly dealt with if the Court were informed by a disinterested trustee just how much is owing to persons who want their money. This is impossible under Chapter XI.

By Chapter XI, everything is sacrificed to speed and economy, but, upon its improper application, it is a false economy. The debtor submits a plan and every phase of the procedure falls under his control. The creditors are often not even notified, because, an enterprising debtor can corral a sufficiency of friends and their acceptances of the plan, before even filing his petition.

> "The arrangement may be consummated at the conclusion of a single creditor's meeting. The Court in passing upon the arrangement is without the benefit of investigation and study by the Trustee or Commission."
>
> *U. S. Realty, supra.*

Chapter XI does not apply to the debtor herein. It is peculiarly adapted to the composition of the debts of small business men. As was stated in a footnote to the *U. S. Realty* case, Chapter XI was sponsored by the National Association of Credit Men and other groups of creditors'

representatives. "Their business of representing trade creditors in small and middle sized commercial failures is an important factor in the background of the Chapter."

Chapter X "sets up a special procedure for the protection of widely scattered security holders and the public, * * * while Chapter XI * * * is peculiarly adapted to the speedy composition of debts of small individual or corporate businesses" (*U. S. Realty, supra,* at p. 447).

> "But granting the jurisdiction of the Court, the question remains of the propriety, in the circumstances, of its order retaining jurisdiction, and of the extent of its duty to go forward with the proceeding under Chapter XI in the face of the contention that Chapter X alone affords a remedy adequately protecting the public and private interests involved. The answer turns not on the court's statutory jurisdiction to entertain a proceeding under Chapter XI, but on considerations growing out of the public policy of the Act found both in its legislative history and in an analysis of its terms, and of the authority of the court clothed with equity powers through its power to withhold relief under Chapter XI when relief is available under Chapter X, which is adequate and more consonant with that policy."
>
> *U. S. Realty, supra,* at pp. 447-8.

Justice and equity require not "a speedy termination" which the debtor prays for, but a thorough examination of competent witnesses by a disinterested trustee into the acts, conduct, properties, liabilities and financial condition of the organization and a plan for an efficient and economical future administration, for the protection of the best interests of the creditors and the members, all of which relief Chapter X is intended to and does afford, and Chapter XI does not.

If the securities in this case are not held by the public, it is hard to imagine a case in which such would be the fact for, while the bonds are not actively traded in since they have been in default as to principal and interest for many years, they can be purchased in over-the-counter houses (45) and are concededly held by many persons and organizations, not members of the debtor or of any fraternal organization with which it might be directly or indirectly identified and who extend across the land.

If ever there was a case in which "the investing public dissociated from control or active participation in the management needs impartial and expert administrative assistance * * *", this is one. The contention of the debtor that this is virtually a private issue and that there is no public interest to be protected is unworthy of credence. While this might conceivably have been valid in 1922, as the Circuit Court of Appeals said:

> "* * * it is patently ridiculous now. The bonds are bearer bonds and have passed from hand to hand for twenty-two years; there are existing over 1,800 bondholders (as compared to only 900 in the United States Realty case), and these are scattered throughout the country. In this connection, the $20,200 in bonds originally issued to the firm of architects of the original building may also be recalled. Surely it cannot be said in the light of such facts that there is no public interest in the bonds. There is an obvious and direct divergence in interest between the nonmember creditors, who desire only repayment, and the member creditors, who are necessarily anxious also to free their fraternal organization finally from the load of debt it has been carrying." (232-233, p. 78)

It is respectfully submitted there is no occasion for This Court to grant the writ so that it may explain or limit or define its decision in the *U. S. Realty* case, *supra*, for, as the Circuit Court of Appeals well stated (227):

"Since the Supreme Court in the *United States Realty* case, *supra,* has made an exhaustive comparison and analysis of the respective purposes of and merits of proceedings under the two chapters, there is little which can be added to the criteria set forth there".

## POINT II

***Hoile et al.* v. *Unity Life Insurance Co.*, 136 Fed. (2d) 133, cited by petitioner in its Point III, is not in point.**

**Petitioner's said Point III is specious.**

Petitioner propounds a Point III which suggests that, by the decision of the Circuit Court herein, petitioner is being "compelled" to file a "voluntary petition" under Chapter X. It cites the *Hoile* case, *supra,* as holding that involuntary proceedings under said Chapter and against a fraternal organization are forbidden and then, by an assumption that "voluntary" proceedings are being "compelled", it suggests that a prohibited "involuntary" proceeding is being induced.

We respectfully submit that all of this is sophism. Petitioner may or need not file voluntarily under Chapter X, as it pleases. No one exerts any restraint one way or the other upon it, neither the Circuit Court in the decision herein, nor anyone else.

The *Hoile* case merely holds that involuntary Chapter X proceedings may not be maintained against fraternal organizations; that voluntary proceedings under that Chapter may be maintained by fraternal organizations and that "reorganization proceedings under Chapter X cannot be resorted to for the mere purpose of liquidation." We fail to see any relevancy whatsoever in the *Hoile* case.

## POINT III

**On the question of the right of the Referee *sua sponte* to initiate the proceedings for dismissal, there is no conflict between the Circuit Courts in the Second and Seventh Circuits.**

The *Frank E. Walsh* case, 256 Fed. 653, is so totally inapplicable (relating as it does to objection to a bankrupt's discharge) that to discuss it would unduly prolong this brief.

True, no party in interest filed any petition upon which the order to show cause, issued by the Referee in the instant case, was based. The District Court questioned the right of the Referee to proceed in this matter, but did not base its decision of reversal upon it (142, 143). The Circuit Court considered the matter and said he had such right (p. 75). On this matter, the Circuit Court said in its opinion (pp. 75-6):

> "First, a referee in bankruptcy clearly has the power *sua sponte* to dismiss a petition for an arrangement under Chapter XI and relegate the debtor to reorganization proceedings under Chapter X. The District Judge read Securities and Exchange Commission *v.* United States Realty & Improvement Co., *supra*, to permit the application of §146 of the Bankruptcy Act—dealing with want of 'good faith' in the filing of a petition for reorganization, to be passed upon by 'the judge' under §141—to apply to a proceeding under Chapter XI, and thus to support the inference that action must be by the judge. But what the Supreme Court actually decided was that a bankruptcy court, as a court of equity and in the exercise of its equity powers, could determine under Chapter XI the adequacy of the relief afforded by that Chapter, in the same manner as it can in reorganization

proceedings under the specific permission of §146. 310 U. S. at pages 455-456. Hence the 'bankruptcy court,' rather than the 'judge,' has this equitable power; and since the Bankruptcy Act, §1(9), includes the referee within the meaning of the term 'bankruptcy court,' the referee had the power to dismiss here."

To all of which must be added an emphasis on the fact that, though the Referee initiated the order to show cause, the creditor-intervenor-respondent, to quote the Circuit Court, "pressed for dismissal" (224).

## Conclusion

It is respectfully submitted that

(a) There is nothing novel in the Circuit Court's ruling nor is there conflict among the Circuit Courts;

(b) The relief available to the debtor under Chapter X is adequate and more consonant with the public policy of the Bankruptcy Act and more likely to give fair, equitable and feasible relief to the 1834 creditors scattered throughout the United States with claims totalling about $1,200,000, than the "summary procedure" the debtor seeks under Chapter XI;

(c) There are no doubtful aspects of the *U. S. Realty* case which require review or refinement by This Court; there is little which can be added to the criteria set forth by This Court in that case.

**It is therefore respectfully submitted that the petition should be denied.**

Respectfully submitted,

KNOWLTON DURHAM,
*Counsel to Creditor-Intervenor-Respondent.*